

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 93 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SUSHILABEN BHUPENRABHAI

Versus

ARUJUNBHAI N PATEL

Appearance:

MR SH SANJANWALA for Appellant

MR DU SHAH for Respondent No. 1, 2, 3, 4, 5, 6, 7

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 27/08/97

ORAL JUDGEMENT

Although the matter is called out twice, the learned advocates are not present. Since the appeal is of 1986, the Court has thought fit not to wait for the learned advocates and has proceeded with the matter.

This appeal is directed against the order of the trial court passed on July 18, 1983, dismissing the suit under Order 11 Rule 21 of Code of Civil Procedure. Respondent no.1-original plaintiff had filed Small Causes

Suit No. 180 of 1981 in the Small Causes Court, Surat for recovery of possession of the suit premises under the provisions of the Specific Relief Act. The suit was contested by the defendants who are respondents Nos. 2 to 7 in the present appeal.

During the pendency of the suit, respondent No.1 executed a Deed of Assignment in favour of the appellant in April, 1982. Respondent No. 1 transferred in favour of the appellant all his rights in the suit property including the right to prosecute the above suit. In view of this development, the appellant filed application ex. 31 in the above suit on June 20, 1983 and prayed that the appellant be joined as plaintiff in the suit and be permitted to prosecute the said suit. The appellant also prayed for consequential relief of granting amendment in the plaint.

On the other hand, the defendants filed application ex. 39 before the trial court, praying that the suit be dismissed on the ground that the original plaintiff had not complied with the order passed by the trial court earlier and therefore, the suit was liable to be dismissed under Order 11 Rule 21 of CPC.

The trial court passed the order under appeal, allowing application ex. 39 and dismissed the suit under Order 11 Rule 21 of CPC. The said order is challenged in the present appeal.

It is the case of the appellant that the trial court had adjourned the hearing of application ex. 31, and no orders were passed on the said application, but without taking up that application, the trial court took up application ex.39 for hearing. According to the appellant, since application ex.31 was not granted, and the original plaintiff had lost all interest in the suit after transferring the suit property to the appellant, naturally the previous order of the trial court could not be complied with and the suit ought not have been dismissed under Order 11 Rule 21 of CPC without first granting application ex. 31 under which the appellant was entitled to be joined as the plaintiff and to prosecute the suit.

The grievance made by the appellant appears to be justified since the appellant had purchased the suit property and had filed application ex. 31, there was no reason for the trial court not to take up application ex. 31 for hearing and to pass appropriate orders thereon, and thereafter to consider the application ex. 39 filed

by the defendants.

In the affidavit-in-reply filed by Shri Jatin Babu K. Desai (Respondent no.3 in the appeal) on behalf of the defendants, it is contended that another suit being Special Civil Suit No. 222 of 1983 in respect of the suit properties, is also pending, and that the appellant had not pressed hearing of application ex. 31 for being impleaded as co-plaintiff and therefore, the suit was rightly dismissed.

There is nothing in the order of the trial court, to show that the plaintiff had not pressed application ex. 31. The rojkam of the suit also does not show that the plaintiff had not pressed the application ex. 31. On the contrary, the rojkam for June 20, 1983, July 1, 1983, July 4, 1983 and July 7, 1983 show that the matter was adjourned from time to time, inter alia, for hearing of application ex. 31 and finally on July 7, 1983, it was adjourned to July 14, 1983. However, the rojkam further shows that the plaintiff or his advocate were not present and the appellant's advocate was also absent and the court took up application ex. 39 filed by the defendants on that very day for hearing and passed the orders on that very day dismissing the suit under Order 11 Rule 21 of CPC.

A perusal of the rojkam shows that the application ex. 31 was dismissed on account of application ex. 39 having been granted. Application ex. 39 was filed for the first time on July 14, 1983. There is also nothing to show that a copy of application ex. 39 was served on the appellant or her advocate. The appellant is also justified in submitting that since the original plaintiff had transferred the suit property in favour of the appellant, naturally the original plaintiff would not take any interest in the suit proceedings or make any attempt to comply with any condition imposed by any previous orders of the trial court and therefore, the plaintiff's advocate also retired as per pursis ex. 40 which was also given on July 14, 1983. It is true that the appellant and her advocate appear to have remained absent on July 14, 1983 but when her application ex. 31 was very much pending, the trial court ought to have passed appropriate orders on application ex. 31 rather than first taking up application ex. 39 which was given on that very day in absence of the appellant or her advocate. It is also required to be noted that the learned advocate for the original plaintiff had also retired by filing pursis ex. 40 on July 14, 1983 itself in absence of the appellant and her advocate. Under

these circumstances, the appellant or her advocate could never have expected that the trial court would dismiss the suit.

In view of the above discussion, it appears that the order passed by the trial court deserves to be set aside and the ad-interim injunction which was granted by this Court while entertaining Civil Revision Application No. 156 of 1983 which was subsequently converted into Appeal From Order No. 93 of 1986, deserves to be continued till the disposal of the suit.

In view of the aforesaid discussion, this Appeal From Order is allowed. The order passed by the trial court below application ex. 39 and the order below Application ex. 31 are set aside and the trial court is directed to hear application ex. 31 filed by the appellant and thereafter take up application ex. 39 filed by the defendants. The ad-interim injunction granted by this Court shall continue till the disposal of the suit.

The appeal is accordingly disposed of with no order as to costs.

Amp/-